

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENERGY BRANDS INC. d/b/a GLACÉAU,

Plaintiff,

-against-

ECOSENTIALS,

Defendant.

**11 Civ. 6940 (DLC)
ECF CASE**

**DECLARATION OF WILLIAM
MCKAY IN SUPPORT OF
ECOSENTIALS' OPPOSITION
TO GLACEAU'S APPLICATION
FOR A PRELIMINARY
INJUNCTION**

I, William McKay, declare as follows:

1. I am the founder and CEO of Ecosentials, LLC ("Ecosentials"). I was responsible for developing Ecosentials' product, packaging design, marketing materials, business summaries, business plans, and advertising. Through my work building Ecosentials, I have become familiar with the food, beverage, and functional beverage markets, the packaging design used by various food, beverage and functional beverage makers, the typical consumers of functional beverages, and the needs and practices of beverage retailers.

Introduction to Vitamin Squeeze

2. Ecosentials has developed a product called "Vitamin Squeeze." Vitamin Squeeze is a functional beverage super-concentrate. A functional beverage is a beverage that is designed to confer some nutritional benefit to the consumer, i.e., to provide the consumer with vitamins and minerals, anti-oxidants, electrolytes, etc., as well as refreshment. Examples of functional beverages in the marketplace include Gatorade, Sobe LifeWater, Vitamin Water, Safeway's Refreshe, and Kirkland's Vita Rain. Unlike conventional functional beverages, which are pre-mixed, ready-to-drink beverages, Vitamin Squeeze is a super-concentrate, meaning that it is designed to be added to water by the individual to create the individual's own custom flavored and nutrient enriched beverage.

3. I founded Ecosentials in response to a number of unmet needs in the marketplace. In particular, I was concerned with the large amount of packaging waste associated with pre-mixed ready-to-drink functional beverages. As consumers become increasingly environmentally conscious, they are demanding products that reduce waste. Vitamin Squeeze meets this demand by allowing

consumers to buy a single bottle of concentrate and use it in a traditional drinking cup, or their own reusable water bottles, as opposed to buying dozens of bottles of pre-mixed ready-to-drink beverage. Additionally, I wanted to give consumers the ability to eliminate sugar, and customize the amount of flavor and nutrition in their own beverages. Conventional pre-mixed functional beverages are often criticized for having a high calorie count. With Vitamin Squeeze, an individual consumes zero calories and can customize the amount of flavor and nutrition added to the individual's drink. Finally, I wanted to provide a more economical alternative to consumers. On a per-drink 8oz serving basis, the price of Vitamin Squeeze is approximately 50% lower than the price for an equivalent number of pre-mixed functional beverages.

4. Prior to Ecosentials, I was involved with my father's company Evercare in product and business development roles. My father invented the adhesive tape lint roller in 1957 and our family worked together to pioneer the product over a 40 year period. We maintained market leadership during our entire ownership. After selling Evercare in 2000 to a private equity firm I patented several next generation lint rollers and pet care products and licensed them to Evercare. I also developed (from soup to nuts) and launched an evolved line of pet shed and odor care products under the Quick & Healthy™ brand name. I sold that line to the Hartz Mountain division of Sumitomo Corporation of America.

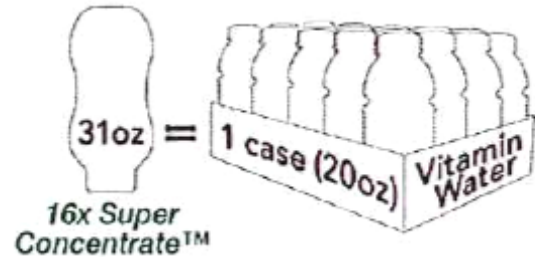
5. My experience as a successful inventor, product and business developer, and serial entrepreneur leads me to believe that Vitamin Squeeze is a "disruptive technology," meaning that it represents a fundamental threat to the market for conventional pre-mixed beverages. Buying a super-concentrate, instead of a case of pre-mixed beverages, is an extremely attractive option for a consumer because it allows the consumer to customize their beverage and be environmentally and health conscious. Also, a super-concentrate is much more convenient to transport and store, and it costs less.

Ecosentials' Business Material and Early Packaging Concepts

6. Because Ecosentials is a small start-up, I prepared a variety of business plans, business summaries, a number of prototypes and other material designed to explain Ecosentials' business to potential investors and to retail customers. Among these is the Business Summary that is attached as Exhibit F to the Declaration of Todd Smith in Support of Glaceau's Application for a Preliminary Injunction. The Business Summary was produced very early in Ecosentials' history, around February 1, 2011, only a few months after its founding in October of 2010.

7. The target recipients of the Business Summary were sophisticated investors including venture capitalists and private equity firms. Some copies were also given to family, business associates and friends. The Business Summary was provided to these individuals, in confidence, and was never widely disseminated or provided to the general public. The Business Summary was not a "marketing flyer" as Mr. Smith suggests.

8. The Business Summary includes the graphic set forth at right. As is set forth in the Business Summary, Ecosentials fully expects that current purchasers of Vitamin Water will switch to Vitamin Squeeze because of the value proposition that Vitamin Squeeze offers. After all, a user can replace



many bottles of Glaceau's Vitamin Water, or some other functional beverage, with a single bottle of Vitamin Squeeze concentrate. By switching to Vitamin Squeeze concentrates, a consumer saves money, consumes zero calories, customizes flavor and nutrition and saves up to 24, 20oz plastic ready-to-drink bottles from the landfill. This was the message that I intended to convey in the Business Summary. I did not represent, nor would any reasonable person believe, that a bottle of Vitamin Squeeze concentrate can transform itself into a 24 bottle case of 20oz bottles of Vitamin Water. Ecosentials no longer uses the graphic above, in any capacity. In fact, Ecosentials has never sold, and has no plans to sell, a 31oz bottle of Vitamin Squeeze such as the one pictured in that graphic.

9. The Business Summary also includes a mockup of a Vitamin Squeeze label that includes the graphic pictured above. This was an early concept sketch. The graphic pictured above was never affixed to any bottle of Vitamin Squeeze destined for sale. In fact, only 300 prototypes of this package were created in March 2011 and passed to family, friends, a few investors, Safeway and Meijer Stores for feedback. Indeed, a later mock-up pictured in a Phoenix Business Journal article of September 9, 2011, attached as Exhibit E to the Smith Declaration, shows that the graphic pictured above had already been removed from consideration by that date¹. Additionally, the Business Summary includes a phrase "turns tap water into vitamin water." This phrase was intended to convey Ecosentials' value proposition to investors, namely that Vitamin Squeeze was an attractive alternative to Vitamin Water. This phrase was not intended to suggest, nor would any reasonable person believe, that the Vitamin Squeeze product changes tap water into Glaceau's product. Both the

¹ The design reflected in the Sept. 9, 2011 article also never went to market.

tagline and the graphic above were comparative statements contrasting Vitamin Squeeze to Vitamin Water. Like the graphic, the tagline was used on closely-held material intended for investors and sophisticated retailers. The tag line was never used in product packaging, or on advertising to the general public. Neither the graphic pictured above, nor the tagline was ever exposed to the public through facebook or any website.

10. The original 300 prototypes and conceptual mock-ups of a Vitamin Squeeze bottle included a number of features complained of by Glaceau: a rectangular matrix to present information regarding the nutrients in Vitamin Squeeze, the use of a battery symbol to denote the presence of electrolytes in Vitamin Squeeze, and a sharp line of demarcation between a highly saturated colored band around the bottom of the bottle next to a lighter colored area. None of these features, or any other features of Ecosentials' product packaging, were copied from the Vitamin Water packaging. In fact my designers were specifically instructed "not to copy". As I explain below, other functional beverages makers use all of these features to label their respective products. In any event, in a good faith effort to eliminate all chance of customer confusion, I removed these elements from the Vitamin Squeeze packaging before the product ever went to market. At no point did Ecosentials sell a bottle of Vitamin Squeeze marked with these features, and Ecosentials has no plans to do so.

Ecosentials' Actual Product Packaging Looks Nothing Like Glaceau's

11. Glaceau's papers, including the Declaration of Todd Smith, focus primarily on closely held, investor oriented material and early concept packaging that Ecosentials never used. Where Glaceau makes a side-by-side comparison Ecosentials' label to Glaceau's product, it does so in a misleading way, by scaling the Vitamin Squeeze bottle such that it is identical in size to a Vitamin Water bottle. A photograph of the actual products side-by-side makes clear that Ecosentials' actual packaging looks nothing like the Vitamin Water packaging.



12. As can be seen from the photograph above featuring the product shipped to Safeway (our only current customer) in early October, the overall impression provided by the Vitamin Squeeze packaging is quite different than that presented by Vitamin Water. Our bottle is differently shaped, having a rounded hour-glass shape. In contrast, the Vitamin Water bottle has a lower cylindrical portion below a bell-shaped upper portion, like a Gatorade bottle. The Vitamin Squeeze bottle is considerably smaller than the Vitamin Squeeze bottle. The Vitamin Squeeze bottle, unlike the Vitamin Water bottle, is shelved upside-down, with its spout pointed downward. Where the Vitamin Water bottle is transparent, the Vitamin Squeeze bottle is a dark gray color, which can be seen at the top and bottom portions of the Vitamin Squeeze bottle. Where the Vitamin Water bottle uses a rectangular matrix, the Vitamin Squeeze bottle uses a series of circular graphics to present information regarding nutrients. Additionally, the Vitamin Squeeze bottle includes two unique and distinctive graphics: a fruit graphic at the top of the bottle and a hand squeezing a bottle into a glass of water at the bottom of the bottle. Near the squeezing graphic is a vertical flavor designator in all caps. Vitamin Water's flavor designator is presented in horizontal text near the top of the label.

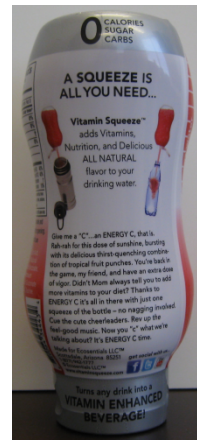
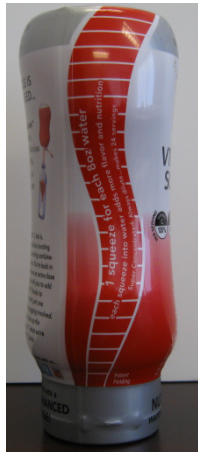
13. Glaceau makes much of the two-toned color scheme of the Vitamin Squeeze bottle. Rather than being a point of confusion, the overall color scheme of the Vitamin Squeeze bottle is a point of distinction. Regular bottles of Vitamin Water, such as the one pictured above, have a color scheme that is reverse to that of Vitamin Squeeze, with a highly saturated color on top, and a white portion below. The closest comparison between the two packages comes when comparing Vitamin Squeeze to Glaceau's low calorie product Vitamin Water Zero, but even there, there is no potential for confusion.



14. As can be seen in the photograph above, where Vitamin Water Zero uses a two-toned label on a transparent bottle, Vitamin Squeeze uses a far more complex color scheme. First, Vitamin Squeeze has gray bands with text at the top and bottom of the bottle. There is no comparable feature on Glaceau's bottles. Where the Vitamin Water Zero bottle has a highly saturated metalized color band at the bottom, Vitamin Squeeze uses a flat color to indicate the color of the beverage. This is necessary because the Vitamin Squeeze bottle is opaque, and without it, the consumer will not know the color of the beverage. Where there is a sharp line of demarcation between the colored and white

zones of the Vitamin Water bottle, the colored zone on the Vitamin Squeeze bottle transitions gradually to a lighter area.

15. Additionally, the top and bottom of the Vitamin Squeeze bottle are connected by a brightly colored segmented "racing stripe", which runs up the side of the bottle. Vitamin Water has nothing like this. Also, while a Vitamin Water bottle has a band of color that extends all the way around the circumference of the package, the Vitamin Squeeze bottle has a top-to-bottom light colored back panel packed with text, which interrupts the extent of the color on the front of the bottle. The back panel includes our slogan "A SQUEEZE IS ALL YOU NEED" in all capital letters. There is nothing like this top-to-bottom back panel on Glaceau's bottles. These features are pictured below



16. Glaceau also complains of supposed similarities in the text used for the respective brand names. While I agree that both the Vitamin Squeeze and Vitamin Water brand names are written in all-lower case letters, that is where the similarities end. As an initial matter, I would note that for regular, sugar-added Vitamin Water, the brand name "**vitamin**water" is written vertically, across the whole label, where for Ecosentials' product, the brand name "vitamin squeeze" is written horizontally. Additionally, in all of Glaceau's products, it bolds the word "vitamin" and leaves the word "water" in a lighter font. Ecosentials, on the other hand, uses all bold characters for "vitamin squeeze." Also "Vitamin Squeeze" is written on two lines, where "Vitamin Water" uses one.

17. There are additional differences between the fonts chosen by the two parties. Glaceau uses a conventional Arial font for its "**vitamin**water" brand name. There are a number of textual features that result from that font choice. For example, the "t" in the Vitamin Water logo has straight cross-bars. The "a" has a spur and a hooked, curved stem. The "m" and "n" have a straight stems. The "i" has a dot. The strokes are straight-edged. The text "vitamin water" occurs on a

single line, and the company name occurs above that line. All of these features are clear in the picture below.



18. None of these features are present in the brand name text used by Ecosentials, which is pictured below. I selected a modern Aller font for the Vitamin Squeeze text, and then directed that it be even further stylized. As a result, and unlike Glaceau's logo, the "t" has a slanted and asymmetrical cross-bar where one half of the cross-bar is connected to the upper stem, the "a" has no spur and has a straight stem, the "n" and "m" have slanted stems, and there is no dot over the "i." The Vitamin Squeeze logo takes up two lines. Additionally, there is a highly stylized "squeezing" graphic that involves the "n" in "vitamin" and the "z" in "squeeze," which marks a radical departure from the "clean" font that Glaceau uses.



19. I am familiar with the press coverage that Vitamin Water has achieved. My understanding is Glaceau has tried to achieve a clean, almost clinical look with its packaging, in order to convey the impression that its beverages are akin to health-care products or medicines. The overall look-and-feel of Vitamin Squeeze bottles is not clinical. With the fruit graphics, the hand squeezing the concentrate bottle into a glass of water, graduated color and vibrant silver bands at top and bottom, along with the racing stripe servings indicator, the impression given by Ecosentials' packaging is that of bright flavors, fun and physical activity. Mine is not a stark, clinical product. In

fact, during the design process, I specifically told my designers to avoid a clinical look. With the clear differences in both the individual elements of the packaging and the overall impression conveyed, I simply cannot see how customers can be confused.

Glaceau Has Not Objected to the Presence of Other Similar Packaging in the Marketplace

20. Glaceau's suggestion that Ecosentials' packaging will confuse its customers or dilute the strength of its "famous" mark is mystifying in view of the many other beverages in the marketplace that resemble Vitamin Water far more closely than Ecosentials' product. For example, Glaceau tolerates the presence of PepsiCo's Sobe Life Water, and Safeway's Refreshe products in the marketplace. A photograph comparing those two products with Vitamin Water appears below.



21. Glaceau has apparently taken the position that Sobe's use of a fade-out color band below a white band, combined with "clean," all lower cased text used for the brand name, with the first word of the font in bold text ("**lifewater**"), is not confusingly similar to Glaceau's trade dress. The Refreshe packaging is even closer to Glaceau's packaging. Safeway's Refreshe packaging uses

(1) a rectangular matrix, (2) clean, all lower cased text for the brand name, (3) a band of color at the bottom of the bottle that fades into a white zone and (4) a bottle that is the identical size and shape of Glaceau's bottle. If Safeway's bottle does not confuse customers, I do not understand how Ecosentials' bottle can confuse customers.

22. Moreover, I understand that Glaceau claims that its two-tone color scheme is somehow unique or distinctive. I do not see how this can be the case. It is common in the beverage industry to label a container with a color corresponding to the color or flavor of the beverage within. Orange soda cans are orange. Similarly, citrus Vitamin Water has an orange label. There is nothing distinctive or unique about putting an orange label on an orange beverage.

Vitamin Squeeze Is Not Placed Next to Vitamin Water on the Store Shelves

23. At present, Ecosentials has one customer, Safeway stores. I understand from Safeway that it plans to shelve Vitamin Squeeze next to its direct competitors, which are other beverage concentrates, and not next to pre-mixed, ready to drink beverages like Vitamin Water. In fact, Safeway Sr. Beverage executives decided to transfer Vitamin Squeeze to Safeway's Powder Drink department and merchandising team, which purchases such items as Kool Aid, Mio, Crystal Light, and Wylers. It is this team to which I ultimately presented the Vitamin Squeeze product line and which was responsible for issuing the purchase orders in August 2011. The Powder Drink section is in a different aisle than the ready-to-drink products where Vitaminwater is merchandised at Safeway Stores.

My Discussions with Todd Smith

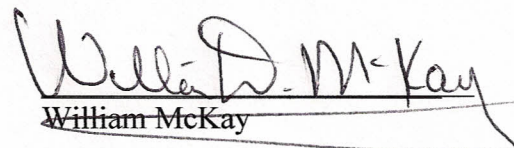
24. On January 13, 2011, I received an email "virtual introduction" from a business acquaintance indicating that Todd Smith, Glaceau's Brand Manager was looking to change jobs and was interviewing with various companies in the functional beverage arena. I approached Mr. Smith about possibly working for Ecosentials. Mr. Smith told me that he was looking for an opportunity to relocate somewhere with better weather, and was particularly interested in the Phoenix, AZ area because his in-laws lived in Scottsdale. Mr. Smith also told me that he would enjoy working for an entrepreneurial company like Ecosentials. Mr. Smith went so far as to consult his lawyers to find out what the consequences would be if he left Glaceau. Ultimately, I decided not to pursue Mr.

Smith, in part, because I was concerned about the legal risk of hiring an executive from a litigious company such as Glaceau.

Ecosentials Would Suffer Great Harm if an Injunction is Entered

25. Glaceau's papers make light of the hardship that Ecosentials will suffer if Glaceau's sought for injunction is granted. Vitamin Squeeze is Ecosentials' only product. As a startup launching a new product into a new product category, Ecosentials is at its most vulnerable right now. Any interruption or threatened interruption in its sales activities will prevent Ecosentials from signing new customers. Moreover, the injunction sought by Glaceau would require a recall of product that has already been shipped to Safeway. This would destroy my company's credibility with Safeway and with the potential customers I am talking to right now. In this market, merchandise is reviewed now, for incorporation in grocery store sales plans for the entirety of next year. Thus, if Ecosentials loses its ability to provide product now, in time to be on shelves for the first quarter of next year, the result will be a twelve-month delay in its sales activities. By the time Ecosentials gets in front of these customers again, its newcomer advantage will be lost for good, and it will find itself competing with other, better financed entrants to this market. Additionally any discontinuity in sales will poison Ecosentials' relationships with its outside sales force, will prevent it from hiring the employees that it needs to grow at this critical time, and will bring critical fundraising efforts to a standstill. An injunction that interrupts sales is, simply put, a death sentence for Ecosentials.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Fenton, Michigan this 17th day of October.


William McKay